Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE
'TELECOMMUNICATIONS ASSOCIATION,
INC., ***et al.***,

Complainants,

E.B. Docket No. 04-381

v.

GULF POWER COMPANY,

Respondent

To: Office of the Secretary

Attn: The Commission

GULF POWER COMPANY'S EXCEPTIONS TO THE INITIAL DECISION

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March 2,2007

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Pursuant to 47 C.F.R. § 1.276, *et seq*, Gulf Power Company **("Gulf** Power") submits these Exceptions to the Initial Decision of the Presiding Administrative Law Judge ("Initial Decision") released on January **3** 1,2007, in this proceeding.

I. STATEMENT OF THE CASE

Gulf Power owns a network of utility poles in northwest Florida. Complainants, through their right of mandatory access, attach facilities to Gulf Power's poles. This is a takings case, set for hearing by the Bureau to determine whether Gulf Power is entitled to compensation in excess of the regulated rate for Complainants' attachments. As a condition precedent to compensation in excess of the regulated rate, *Alabama Power v FCC* requires that Gulf Power make a showing of "rivalry" on its poles (referred to alternatively in the opinion as "crowding" or "full capacity") The most critical error in the Initial Decision is the determination that there is no such thing as a "full capacity" pole, so long as capacity can be expanded to accommodate a new attacher – including actually taking a pole out of the ground and replacing it with a larger pole. (HDO, ¶ 11).

Complainants initiated this dispute almost seven years ago by filing a complaint challenging Gulf Power's termination of existing pole attachment agreements and implementation of a $38.06 per pole annual charge for Complainants' mandatory access. While this case sat dormant, the case of *Alabama Cable Telecommunications Association v. Alabama Power Company* worked its way through the Commission and the Eleventh Circuit Court of Appeals. On appeal of the Commission's order granting ACTA's complaint, Alabama Power argued that the Cable Rate was constitutionally insufficient for a number of reasons. *Alabama Power v. FCC*, 311 F.3d 1357, 1367 (11th Cir. 2002) *("Alabama Power").* In response to Alabama Power's argument, the Court explained: "While we might ordinarily be sympathetic to

[APCo's] argument, APCo's case is complicated by one known fact, one unknown fact, and one legal principal." *Id.* at 1368. The critical "unknown fact" was that "nowhere in the record did APCo allege that APCo's network of poles currently is crowded." *Id.* at **1370.** The Eleventh Circuit ultimately affirmed the result reached by the Commission, though on radically different grounds. *Alabama Power* also introduced a novel and nuanced analysis never before articulated in takings jurisprudence.

After *Alabama Power,* the Bureau ruled against Gulf Power based on **Gulf** Power's failure to meet the standard in *Alabama Power.* Gulf Power sought **a** hearing, and the Bureau granted Gulf Power's request. Though discovery was limited and certain evidence **was** excluded, Gulf Power alleged and proved that its poles are crowded. Through the testimony, evidence and argument presented at trial, Gulf Power offered the Presiding Judge a practical interpretation of *Alabama Power* that comports with other binding precedent (including *Southern Co. v. FCC,* 293 F. 3d 1338 (11th Cir. 2002) ("*Southern Co.*")). Gulf Power demonstrated rivalry (described elsewhere in *Alabama Power* as "crowding" and "full capacity") on its poles in three different ways: structural rivalry; systemic rivalry; and rivalry on exemplar poles. *(See* GP Proposed Findings, ¶¶ 30-54).[1]

The Initial Decision, however, adopts an unreasonable interpretation of *Alabama Power* (as advocated by Complainants) that is impractical and inconsistent with other controlling law. The Initial Decision ignored actual pole data and accepted Complainants' premise that a "pole" **is** not really a pole, but instead is a never-ending, expandable piece **of** property. The Initial Decision finds that there is no such thing as a "full capacity" pole – a finding which precludes any meaningful application of the *Alabama Power* and *Southern Co.* holdings. *The* Initial

[1] **As** such, **the** Presiding Judge's finding that "Gulf **Power's utility poles** are **'for** practical **purposes** nonrivalrous"' is clearly erroneous. (Initial Decision, ¶ 20).

Decision also belies 47 U.S.C. § 224(f)(2), which entitles a "utility.... [to] deny a cable television system or any telecommunications carrier access to its poles...where there **is *insufficient capacity*** and for reasons of safety, reliability and generally applicable engineering principles." (Emphasis added).

Gulf Power files these exceptions to the Initial Decision within the time period required by 47 CFR § 1.276(a)(1).

II. STATEMENT OF QUESTIONS OF LAW AND FACT PRESENTED

1. The Initial Decision Misinterprets, Misapplies, and Renders Meaningless *Alabama* ***Power*** *Co. v. FCC.*

2. The Initial Decision Disregards The Plain Language of 47 U.S.C. § 224(f)(2).

3. The Initial Decision Misinterprets and Misapplies *Southern Company v. FCC*, Which Specifically Overruled the Commission's Requirement that a Utility Expand Capacity to Accommodate Attachers.

4. The Presiding Judge Erred in Finding There is No Such Thing As a "Full Capacity" Pole So Long **As** Capacity Can Be Expanded Through Pole Rearrangement or Pole Change-Out.

5. The Initial Decision Erroneously Holds That Safety Standards Have "Nothing to Do With Capacity."

6. The Initial Decision Erroneously Finds That Gulf Power Did Not Contradict Testimony from Complainants' Engineering Expert Regarding the Definition of a "Full Capacity" Pole.

7. The Initial Decision Erroneously Discards and Discredits the Uncontradicted Evidence That Gulf Power's Pole Network Is Not an "Essential Facility" to Complainants.

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10. The Presiding Judge Erred By Not Adopting Gulf Power's Proposed Findings.

11. The Presiding Judge Erred in Denying Gulf Power's Motion to Strike The Pre-Filed Direct Testimony of Complainant's Economist and Further Erred in Relying on that Testimony.

12. The Presiding Judge Erred in Excluding Evidence Relied Upon by Gulf Power's Valuation Expert.

13. The Presiding Judge Erred By Not Allowing Gulf Power the Opportunity to Cross-Examine Complainants' Representatives.

III. ARGUMENT ON EXCEPTIONS

1. The Initial Decision Misinterprets, Misapplies, and Renders Meaningless *Alabama Power* Co. *v. FCC.*

The Initial Decision notes that Gulf Power "rails against the fairness of the *Alabama Power* test." (Initial Decision, ¶ 25). That is correct. Gulf Power believes *Alabama Power* was wrongly decided insofar as it requires a showing of rivalry (variously described in the opinion as "crowding" or "full capacity") before a property owner is entitled to just compensation for the taking of its property. This standard has never before been articulated in any physical takings case and is dangerous precedent. But so long as *Alabama Power* remains the law, it should be interpreted in a way that gives the decision meaning, and harmonizes it with other binding precedent. The Initial Decision renders *Alabama Power* meaningless and interprets the decision in a way that directly conflicts with *Southern Co.* and the express terms of 47 U.S.C. § 224(f)(2).[2]

The Initial Decision holds, in essence, that a pole is never at "full capacity" unless the pole *cannot* be rearranged or changed-out to accommodate a new attacher. (Initial Decision, ¶¶ *20,* 25). If this is the **case,** then there is no practical or economically meaningful set of

[2] To be clear, Gulf Power reserves the right to argue in an appellate court that *Alabama Power* was wrongly decided.

circumstances under which a utility is entitled to pole attachment rentals in excess of the regulated rate. This cannot be the intent of ***Alabama Power.*** *If* it were, the Eleventh Circuit would have said so and would have made clear that it would be infrequently, if ever, that a utility could avail itself of the new standard announced. Instead, the Eleventh Circuit specifically contemplated that a utility would be able to meet the new standard. ***See*** 311 **F.** 3d at 1370. The Eleventh Circuit noted

> The possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded, the pole space becomes rivalrous. Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime.

Id

Furthermore, the Initial Decision drew a critical distinction between the terms "crowded" and "full capacity" where no such distinction exists in the ***Alabama Power*** decision. (Initial Decision, ¶¶ 6, 19). This is important because Initial Decision implies that "crowded" would be an easier standard to meet. (Initial Decision, ¶ 6; "Gulf Power would lower the standard of proof to show merely crowded poles. . . ."). The Initial Decision drew a distinction between the terms "crowded" and "full capacity'' even though:

> the terms "crowded," "rivalrous" and "full capacity" are used interchangeably throughout ***Alabama Power;***
>
> - Complainants' experts used the terms "crowding" and "full capacity'' synonymously until counsel for complainants instructed them to "limit our use of term 'crowding' or 'crowded' ... to emphasize Gulf Power's burden." (GP **Exs.** 73-75; Kravtin Cross, Tr. pp. 1449-84; Harrelson Cross, Tr. pp. 1603-18; **see *also*** Gulf Power's Reply Findings, ¶¶ 24, 30); and
>
> Complainants' economics expert conceded that "the evidentiary burden of Gulf Power in terms of demonstrating a rivalrous condition on the pole would be true whether we call it crowding or full capacity." (Kravtin Cross, Tr. p. 1482).

The Initial Decision also narrowly and erroneously decided that ***Alabama Power*** amounts

to nothing more than a two-part "test," and that the Enforcement Bureau designated this matter for hearing "for the sole purpose of affording Gulf Power an opportunity to present evidence to an Administrative Law Judge under that [two part] test." (Initial Decision, ¶ 26). However, the issue actually set for hearing was broader in scope? Though Gulf Power does not purport to speak for the Enforcement Bureau, Gulf Power believes one of the reasons the case was set for hearing was to ***interpret*** the novel standard in *Alabama* ***Power*** – not to reduce the case to an unreasonable test. The Initial Decision should have interpreted *Alabama* ***Power*** to mean that once Gulf Power shows rivalry, it is entitled to just compensation in the form of fair market value (or an acceptable proxy). This interpretation makes sense and comports with *Alabama* ***Power's*** statement that "a power company where poles are, in fact, full can seek just compensation." 311 F. 3d at 1371.[4]

2. The Initial Decision Disregards The Plain Language **of 47 U.S.C. § 224(f)(2).**

Section 224(f)(2) gives a utility the right to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Southern* Co. (addressed in **part** III.3 below) held that this statutory provision means what it says. The Initial Decision, however, refers to a "mandate under the Telecommunications Act to ***make*** space available for cable attachers on utility poles." (Initial Decision, ¶ 14). This reflects a fundamental misunderstanding of a utility's statutory rights. The Initial Decision completely glosses over the impact of § 224(f)(2), citing it only twice – once in an incomprehensible footnote and once along the way to misinterpreting *Southern Co.*. (Initial Decision, ¶¶ **20** n.9 &

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[3] The issue in the HDO was as follows: "Whether Gulf Power **is** entitled to receive compensation above marginal costs for any attachments to its poles belonging to Cable Operators and, if so, the amount of any such compensation."

[4] This interpretation also comports with ***Alabama Power*** insofar **as** it requires a threshold showing that the property at issue is *not* excess/surplus ("one million" foot pole) **or** akin **to** the "national defense" – the common example of a non-rivalrous good cited by the Eleventh Circuit. 311 **F.** 3d at 1369.

24)

Footnote 9 of the Initial Decision quotes the relevant portion of § 224(f)(2), but follows it immediately by stating: "It is noted that such conditions can usually be fixed and occur so infrequently as to become ***de minimus*** to a network." (Initial Decision, ¶ 20 n.9). Where does this come from? Certainly not the record - a point emphasized by the lack of any record citation. Even if this statement was supported by the record, it has ***nothing*** to do with a utility's right to deny access for reasons of insufficient capacity.

3 The Initial Decision Misinterprets and Misapplies *Southern Co. v. FCC*, Which Specifically Overruled the Commission's Requirement That a Utility Expand Capacity to Accommodate Attachers.

The Initial Decision states that *Southern* Co. is "inapposite" and "has no decisional application in this case" (Initial Decision, ¶ 24) even though ***Southern*** Co. squarely addresses pole "capacity" – but in a way that directly conflicts with the Initial Decision's interpretation of the term "full capacity." In ***Southern*** Co., electric utilities appealed a Commission rulemaking that "require[d] a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its **own** needs." 293 F.3d at 1346 (quoting ***Order*** on ***Reconsideration,*** 14 FCC Rcd. 18049, ¶ 51 (Oct. 20,1999)). The concept of capacity expansion was defined by the Commission to include steps taken "to rearrange or change out existing facilities at the expense of the attaching parties in order to facilitate access." ***Order*** *on* ***Reconsideration,*** 14 FCC Rcd. 18049, ¶ 53 (Oct. 20, 1999). The Eleventh Circuit held that the "FCC's position [was] contrary to the plain language of § 224(f)(2)." ***Southern Co.,*** 293 F.3d at 1346. If capacity must be expanded to accommodate a new attachment on a given pole, then that pole is at full capacity. There is no way around this inevitability – perhaps the reason the Presiding Judge summarily dismissed ***Southern*** *Co.* as "inapposite." The Initial Decision's error is even more egregious considering that the Elcvcnth Circuit itself tied § 224(f)(2) and

Southern Co. into its ***Alabama Power*** analysis where it said "Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime." *Alabama* ***Power,*** 311 F. 3d at 1370.

The Initial Decision also incorrectly states:

> ***Southern Co.*** narrowly holds that "when it is agreed [by pole owner and attacher] that capacity is insufficient," a utility may not be required to provide an attacher with access to the pole.
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> * * * *
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> The decision also holds that the term "insufficient capacity" was not defined by statute, was ambiguous, and that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient."
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> * * * *
>
> In any event, since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the ***Southern Co.*** decision is not relevant to any *HDO* issue. . . .

(Initial Decision, ¶ 24)(brackets in Initial Decision)). There are several errors embedded in the above statements. First, assuming the phrase "when it is agreed" means what the Complainants/Initial Decision say it means, the analysis ignores the undisputed evidence in this case that there is virtually ***never*** a disagreement between Gulf Power and Complainants as to whether make-ready (rearrangement or change-out) is required on a given pole. ***(See*** GP Proposed Findings, ¶ 51). Instead, the Initial Decision effectively bootstraps Complainants' interpretation of "full capacity" (*i.e.,* the never-ending pole) on the ***Southern Co.*** analysis in a way that renders the decision and the statutory construct meaningless.

Second, the portion of ***Southern*** Co. cited by the Initial Decision regarding **"ambiguity"** appears in the discussion of the reserved space issue – not the capacity expansion issue. In fact, what *Southern* Co. said was that, in light of the ambiguity, the Commission's construction of the

term "insufficient capacity" – "to mean the actual absence of usable space on a pole" – was reasonable. 293 F. 3d at **1349.** This definition was important to the Court's resolution of the reserved space issue because "reserved space" is, in fact, "usable space." Thus, the Court upheld the commission's rule that a utility could not deny access on grounds of "insufficient capacity" where there was "actual . . . usable space on a pole" (albeit "reserved" by the utility). The Initial Decision, in addition to misapplying *Southern* Co., also runs a foul **of** the Commission's own definition of "capacity," which refers to the ''actual absence of usable space on a pole."

One of two things has happened: either (1) the Presiding Judge divorced the "capacity" analyses in ***Alabama Power*** and ***Southern*** Co. (a result ***Alabama Power*** specifically disavows); or **(2)** the Presiding Judge neglected to follow *Southern* Co. (as required by, among other authorities, 5 U.S.C. § 706). Either way, the "full capacity" analysis in the Initial Decision is fatally flawed.'

4. The Presiding Judge Erred in Finding There is No Such Thing As a ''Full Capacity" Pole So Long As Capacity Can Be Expanded Through Pole Rearrangement or Pole Change-Out.

As set forth above, any finding that there can be no "full capacity" pole if make-ready is possible is at odds with § 224(f)(2), ***Southern Co.,Alabama Power,*** and the record in this case. This finding is also erroneous because it relies on some future hypothetical pole or future hypothetical condition **of** the **pole,** rather than *actual* **poles** currently in place in their current condition. *Alabama* ***Power*** is clear that the crowding/capacity/rivalry analysis applies to poles in

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[5] Perhaps the Presiding Judge's decisional errors are driven by his misconception that this **is** a **"rent** regulation case." ***(See*** Initial Decision, ¶ ***20*** ("In another rent regulation case . . .")). **This** is a takings case, and "[w]hen a physical taking is at issue . . . a different analytical hat **must** be **worn."** ***Alabama Power,*** 311 F. **3d** at 1367. The Presiding Judge's reliance on ***Metropolitan Trans. Auth. v.*** *ICC*, 792 F. 2d **287** (2d Cir. 1986) is, therefore, inappropriate and ignores the ***Alabama Power*** observation that "crowding is perhaps **more** likely in **the** context of pole space." ***Alabama Power,*** 311 F. 3d at 1370. **Instead, the** Presiding Judge relies on the "rent regulation" case to conflate ***Alabama Power's*** capacity analysis with the higher valued use and lost opportunity inquiries. (Initial Decision, ¶ 20).

their current condition: "Nowhere the record did APCo allege that APCo's network of poles is currently crowded." 311 F. 3d at 1370 (emphasis added); **see** *also* 311 F. 3d at 1371 ("To be sure the Cable Bureau and the full Commission might have been advised to inquire about the level of capacity presently on APCo's poles."). If the focus of this case was on future hypothetical poles, both parties wasted time and money surveying actual poles in Gulf Power's system.[6]

The Initial Decision also relies on Gulf Power's past practices of accommodating attachers through make-ready as a basis for its finding that there is no such thing as a "full capacity" pole. (Initial Decision, ¶¶ 15, 19, 20, 22 and 24 ("A finding **of** whether a pole's insufficient capacity caused a missed opportunity must consider Gulf Power's historical willingness to accommodate attachers by performing make-ready.")). But Gulf Power's past practices have nothing to do with either current condition **of** its poles or its right to exclude attachments for reasons of insufficient capacity. 47 U.S.C. § 224(f)(2). The capacity analysis in the Initial Decision focuses on the past and future condition of Gulf Power's poles while avoiding the condition placed at issue by *Alabama* ***Power*** – the current condition.

5. The Initial Decision Erroneously Holds That Safety **Standards** Have **"Nothing To Do With** Capacity."

The Initial Decision states that the observance of safety standards has "nothing to do with capacity." (Initial Decision, ¶ 14). The Initial Decision goes on to state that "safety space **does** not prevent additional attachments or alternative uses" and "compliance with safety has never rendered a pole full capacity." (Initial Decision, ¶¶ 12, 15). These conclusions are contrary to the evidence presented by both parties.

[6] Early **in the proceeding (December 2004), the Presiding Judge ordered Gulf Power** to **prepare an audit of its** joint **use poles "by description** of *current* **utilization." (Order** FCC **04M-41, p. 2) (Emphasis added).**

While the parties disagreed about the specific ramifications, both sides acknowledged the importance of contractual and National Electric Safety Code ("NESC") clearance requirements in their analysis of the current condition of Gulf Power's poles. The Complainants' expert engineer spent approximately 100 hours or more photographing and analyzing current pole measurements. (Harrelson Cross, Tr. pp. 1033-36). His work centered on clearance and safety issues, with some of his work-papers being labeled "Sources of Crowding and Code Violations." (GP Ex. 76). Gulf Power retained a third-party contractor, Osmose, to take spacing measurements to determine whether another attacher could be added to the pole (as determined by NESC and contractual specifications) in its current condition. (GP Proposed Findings, ¶¶ 52-54). The measurements Osmose took were the same measurements Complainants' took and their expert examined. (Harrelson Cross, Tr. pp. 1610-13). One of Complainants' own representatives admitted at deposition that Gulf Power's construction specifications are "the bible for pole attachments." (GP Proposed Findings, ¶ 58; GP Ex. 67 (O'Ceallaigh Depo.), pp. 54-55). Complainants' representatives all focused on clearance requirements and, unlike their expert, had no difficulty finding "full" poles. ***(See,*** *e.g.,* GP Ex. ***86*** (Cox representative O'Ceallaigh's pole analysis identifying three poles as "full")). Both parties were addressing the same universe of data (clearances and safety requirements) to analyze the capacity on Gulf Power's poles. (GP's Proposed Findings, ¶ 43).

The ability to safely attach another cable to an existing pole in a manner that is compliant with contractual and NESC specifications can be the only measure of pole capacity that breathes any meaning into the Eleventh Circuit's analysis in both ***Alabama Power*** and ***Southern Company.***

6. The Initial Decision Erroneously Finds That **Gulf** Power Did Not Contradict **Testimony Prom** Complainants' Engineering Expert Regarding the Definition **of** a **"Full** Capacity" **Pole.**

The Initial Decision finds that "Complainants' engineering expert opined without contradiction, that a utility pole is never at full capacity if make-ready work can accommodate an additional attachment." (Initial Decision, ¶ 17) (emphasis added). This finding could not be more contrary to the record. Ben Bowen and Mike Dunn (Gulf Power witnesses) both testified that a "full capacity" pole is one that would require make-ready to accommodate an additional attachment. (GP Ex. B (Bowen Direct), pp. 26-28; Dunn Rc-Direct, Tr. pp. 844-50).[7]

A core theme running through both the factual and legal presentations by both parties was the competing notion of whether the capacity analysis on a pole focuses on (a) the current condition of poles **(Gulf** Power's position), or (b) a future hypothetical pole (Complainants' position). ***(See*** GP Proposed Findings, ¶¶ 3, 26-29). The notion that a pole must be viewed as "dynamic" and therefore, is never at full capacity if it can be re-arranged or changed-out, was hotly contested throughout the trial. (See GP Proposed Findings, ¶¶ 3, 5, 9, 10, 26-29, 30-54; GP Ex. **A** (Dunn Direct), p. 21, lines 8-16; GP Ex. B (Bowen Direct), pp. 27-28; GP Opening Statement, Tr. pp. 654-55; Kravtin Cross, Tr. pp. 1380, line 7-8; 1521-22; Harrelson Cross, **Tr.** pp. 1583-94; GP Closing Statement, Tr. pp. 2034-36).

The Initial Decision itself notes Gulf Power's contradiction of the supposedly "uncontradicted" point made by Mr. Harrelson. In the very paragraph where the "without contradiction" **finding** is made, the Initial Decision cites testimony from a Gulf Power witness (Bowen) that a crowded pole is one that reflects "an NESC violation, Gulf Power violation, or

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[7] The Initial Decision partially quoted testimony from Mr. Dunn that "a rearrangeable pole would not be at full capacity." (Initial Decision, ¶ 22). **As** pointed out in **Gulf** Power's Reply Findings (at ¶¶ 19-20), that testimony was elicited with a confusing line of questioning by counsel for Complainants and **was** addressed in re-direct where Mr. **Dunn** testified that "if a pole requires make-ready it is crowded." (Dunn Re-Direct, Tr. pp. 849-50). Mr. Dunn then explained that the term "make-ready" includes "rearrangement or replacement" (*Id.*) (emphasis added)).

any other applicable code or one that would not accept another attacher." (Initial Decision, ¶ 17). Moreover, inherent in the testimony of Complainants' engineer is the reality that make-ready involves "expanding capacity." Mr. Harrelson explained that "make-ready" involves the process of either "rearrangement or change-out" in order to accommodate an attachment. ***(See*** Compls. Ex. B (Harrelson Direct), p. 10). Mr. Harrelson then equates that make-ready process to "**[e]xpanding pole capacity.**" *(Id.*, pp. 10-11 (emphasis added)). Where make-ready is required to accommodate a new attachment, there is a rivalrous condition on a utility pole. ***(See*** **GP** Proposed Findings, ¶¶ 23-25; 26-29; 46-51).

Finally, Complainants' economic expert (Patricia Kravtin) admitted that make-ready is central to a rivalry analysis. According to Ms. Kravtin, the touchstone **of** rivalry is "exclusion." (Kravtin Cross, Tr. pp. 1501 ("the whole underlying concept under rivalry is the situation where there is exclusion from use of the infrastructure"); 1393-94 ("Where we identify situations where there is a rivalrous condition on the pole, and that there has been exclusion")). Ms. Kravtin goes on to explain that "make-ready" is the "customary way by which Gulf Power and other utilities are able to accommodate attachments so that they don't have to exclude attachments from the pole that come along." ***(Id.,*** p. 1386). If make-ready is the way Gulf Power avoids exclusion, and exclusion is the touchstone of rivalry, then the need for make-ready necessarily means there is "rivalry." This is not **a** "finesse" of the rivalry analysis **(as** termed by the **Initial** Decision, ¶ 19). It is the *only* practical way of performing the analysis

In describing the ***Southern*** *Co.* decision, the ***Alabama*** *Power* court described the FCC's regulations as forcing "power companies to enlarge pole capacity at the request (and expense) of attaching" entities - *i.e.* forced make-ready. 311 **F.** 3d at 1363, n. 8. The Court then observed that the ***Southern*** *Company* "panel could not reconcile the **no-capacity** excuse allowed under the

statute with the forced build out rules required under the FCC's regulations, and thus held the regulations to be *ultra vires. Id* (emphasis added). Thus, ***Alabama Power*** recognized that the need to "build out" equated to a condition of "no capacity" sufficient to trigger § 224(f)(2). *Id.* The Initial Decision cannot be reconciled with ***Southern Co.*** or the record in this proceeding. ***(See*** GP Proposed Findings, ¶¶ 3, 5, 9, 10, 26-29, 30-54).

7. The Initial Decision Erroneously Discards and Discredits the Uncontradicted Evidence That **Gulf** Power's Pole Network **Is Not an** "Essential Facility" to Complainants.

The uncontroverted evidence in this case was that Complainants can (and regularly do) build their plant underground versus overhead. **(See** GP Proposed Findings, ¶ 66). Complainants' analysis as to whether to build overhead or underground is based more on **a** "business case" rather than being driven by physical barriers *or* insurmountable economic barriers. ***(See*** GP Proposed Findings, ¶¶ 67, 68). Moreover, the cost difference between standard overhead construction and underground construction is not drastic. ***(See*** GP Proposed Findings, ¶ 68). The only evidence presented by Complainants that even remotely touches this issue is generic testimony from Complainants' economist that utilities have control over essential facilities to cable operators. (Compls. Ex. **A** (Kravtin Direct), p. 8). However, on cross examination, Complainants' economist conceded that she did nothing to determine whether Gulf Power's pole network is **an** essential facility to Complainants, did not know the extent to which Complainants were constructing their plant underground, did not know the cost differential between overhead and underground construction, had not read the Complainants' own deposition testimony in this case, and conceded that Complainants had other options for deploying their services. (GP Proposed Findings, ¶ 66, 69; GP Reply Findings, ¶ 23).

There was no way – based on the record in ***this*** *case* – the Presiding Judge could have

found Gulf Power's pole network to be an "essential facility." For this reason, the Presiding Judge went outside the record and stated "This argument amounts to a long-discredited attack on the basis for the Pole Attachment Act which the Commission is not at liberty to ignore, and has nothing to do with the HDO." (Initial Decision, ¶ 21). There are several errors embedded in this statement. First, Gulf Power is not asking the Commission to "ignore" anythmg. To the contrary, Gulf Power asks only that the decision be based on the actual evidentiary record in this case – not on recycled conclusions from other cases with different evidentiary records (or no evidentiary records at all).[8] Second, the fact that Gulf Power's pole network is *not* an essential facility to Complainants has everything to do with the HDO. The essential facilities doctrine is the underpinning of the regulatory regime from which the policy-based, subsidized Cable Rate was born. *Alabama Power,* 311 F.3d at 1361-63. That Gulf Power's facilities *are* not essential severely undermines one of Complainants' main positions in this case – that the Cable Rate is "gracious plenty" even in situations where a **pole** is rivalrous, crowded or at full capacity. This ties directly into the "amount of any such compensation" part of the issue set for hearing by the HDO. Complainants themselves felt the essential facilities assertion was relevant; both of their experts claimed, without facts, that Gulf Power's poles are essential facilities and Complainants' counsel addressed it during Opening Statements. (Kravtin Cross, Tr. p. 1344-72; Harrelson Cross, Tr. p. 1542; Complainants' Opening Statement, Tr. p. 674).

8. The Initial Decision's Finding That "Gulf Power Is Not Operating at a Financial Loss in Complying with the Cable Formula" Misses **the Mark, Both Legally and Factually.**

The Initial Decision's finding that "Gulf Power is not operating at a financial loss"

[8] If the Commission *is* at liberty to ignore uncontroverted evidence in a utility's quest for just compensation, then there is a serious due process issue at hand, demonstrative of an inability to administratively determine takings and just compensation issues. *See Monongahela Nav. Co. v. United States,* 148 U.S. 312,327, 13 S.Ct. 622,626-27 (1893) (decisions concerning the just compensation awed an owner whose property is taken is within the province of judicial and not legislative determination).

through the FCC formula combined with Complainants' payment of make-ready costs is legally flawed, factually incorrect, and inconsistent with the record. (Initial Decision, ¶ 11). First, the Initial Decision's novel "not-operating-at-financial-loss" standard is inconsistent with established takings law. Just compensation – typically determined by fair market value – is *the* standard in a takings case, not some illusory determination of losing money **or** "operating at a financial **loss."** *Alabama* ***Power*** summarized the relevant U.S. Supreme Court takings jurisprudence as follows:

> In physical takings cases, the property owner generally must receive the ''full monetary equivalent of the property taken." The Supreme Court has remained steadfast in its resistance to a rigid rule for determining just compensation. Typically, fair market value is used. Fair market value is established by determining "what a willing buyer would pay in cash to a willing seller" at the time of the taking. There is not an active unregulated market for the use of "elevated communications corridors," however, and so **an** alternative to fair market value must be used. The appropriate alternative, whatever that may be, rarely countenances the uses of historical cost, as several Supreme Court cases make clear.

311 F.3d at 1368 (internal citations to numerous U.S. Supreme Court ***cases*** omitted).[9]

The determination is not whether or not the property owner is suffering an actual negative cash flow, but whether or not the property owner is receiving fair market value (or an alternative) for the loss. The record in this proceeding established that Gulf Power is not receiving fair market value (or its proxy) for Complainants' attachments. ***(See,*** *e.g.,* GP **Ex.** F (Spain Direct), pp. 12-18).

Even if "financial loss" was the correct standard, the Initial Decision errs because the record in this proceeding established that Gulf Power and its ratepayers suffer a "financial loss" every **time** Complainants are allowed to pay **an** artificially low subsidized rate based on outdated

[9] The record in ***this*** proceeding established there is **an** unregulated market for **the use of** elevated communications corridors. ***(See, e.g.,*** GP **Exs.** F, ***G,*** H, I, **57,** ***58*** & ***59).*** **This is** market evidence that **has** never before been in front of this Commission, **and** evidence that was not before the Court in *Alabama* ***Power.***

historical costs, rather than higher market rates. ***(See, e.g.,*** GP Ex. F (Spain Direct), pp. 12-18; GP **Ex.** 57, 58, 59, 60, 66, 67). Gulf Power loses money because it is not receiving fair market value for the space occupied by Complainants, and not even receiving the $15-$20 negotiated rates paid by Complainants to other pole owners (not covered by § 224).

9. The Initial Decision Erroneously Finds That **Gulf** Power Failed to Present "Proof That Potential Users **Will** Pay Higher Rent" **For** the **Pole Space** Taken by Complainants.

The Initial Decision is inconsistent with the record in finding that Gulf Power failed to present "proof that potential users will pay higher rent" for the pole space Complainants occupy on Gulf Power's poles. (Initial Decision, ¶ 20). Complainants themselves pay $15-20 per attachment for identical space to Choctawhatchee Electric Cooperative ("CHELCO"), an electric cooperative in northwest Florida. (GP Ex. F (Spain Direct), p. 21; GP **Exs.** 57, ***58,*** 59, 66, 67). It is undisputed that these payments are made pursuant to negotiated agreements. ***(Id.).*** The record also reflects (without contradiction) that at least one Complainant has negotiated to pay $18 per attachment. (GP Ex. F (Spain Direct), p. 22; GP Ex. 66). Finally, Gulf Power presented evidence of three other attachers who currently pay more than $40 per attachment on **Gulf** Power's poles. (GP Ex. F (Spain Direct), p. ***23;*** GP Ex. 60).

Gulf Power presented unrebutted evidence through its valuation expert, Roger Spain, ***of*** an unregulated market for pole attachments, and that prices are upwards of $20 per attachment in an unregulated market. (GP Ex. F (Spain Direct), pp. 19-24). This evidence was the result of Mr. Spain's research and review of rates negotiated between electric utilities and cable attachers (including Complainants) in pole attachment transactions and was not challenged by any testimony or evidence presented by the Complainants. ***(Id.,*** pp. 19-20). ***Mr.*** Spain's testimony was unrebutted; in fact it was supported in part by Complainants' own documents. (GP **Exs.** 57-

59).

Gulf Power further presented evidence that the prices yielded under Gulf Power's replacement cost methodology are a recognizable fair market value proxy for attachments to Gulf Power's poles. (GP Exhibit E (Davis Direct), pp. 4-5; GP Ex. F (Spain Direct), p. 18). The use of a "proxy" for fair market value is consistent with established United States Supreme Court takings jurisprudence as discussed in ***Alabama Power.*** 311 F.3d at 1368. To whatever extent the Initial Decision purports to require that Gulf Power present an actual alternative user of the space (an actual "buyer waiting in the wings") before recovering fair market value for the taken pole space, that misinterprets and misapplies applicable takings law. (GP Proposed Findings, ¶¶ 74-81). For example, ***Alabama Power*** does not require proof of an actual buyer, but instead, refers to the hypothetical buyer: "Typically, . . . [flair market value is established by determining what a 'willing buyer would pay in cash to a willing seller' at the time of the taking." 311 F.3d at 1368 (quoting ***United States v. Miller,*** 317 U.S. 369, 374 (1943)). Even Complainants' economic expert agreed that the "general appraisal method" of determining fair market value focuses on hypothetical buyers and sellers. (Kravtin Cross, Tr. pp. 1407-09).[10]

10. The Presiding Judge Erred By Not Adopting Gulf Power's Proposed Findings.

Gulf Power's Proposed Findings apply the record evidence ***in this case*** to the controlling law. Gulf Power's Proposed Findings reconcile the totality of evidence rather than relying on isolated excerpts. Gulf Power's Proposed Findings bring meaning and life to ***Alabama Power,*** rather than rendering it meaningless. Gulf Power's Proposed Findings reconcile ***Alabama Power*** and ***Southern Co.*** Complainants' Proposed Findings – many of which were incorporated into

[10] If the focus in this case is on hypothetical poles and actual buyers (rather than the other way around), then takings law has truly been turned on its head.

the Initial Decision – rely on non-evidence and usupported conclusions. Complainants' Proposed Findings, where they rely on evidence at all, cite isolated excerpts rather *than* reconciling the totality of evidence.

Gulf Power's Proposed Findings offered, and the evidence buttresses, a workable and meaningful approach to *Alabama Power:* a rivalrous condition exists on any **pole** where make-ready would be required in order to accommodate an additional attacher. (GP Proposed Findings, ¶¶ 1-105). In this case, Gulf Power has proven the critical "unknown" fact in *Alabama* ***Power v. FCC*** - its pole space is "rivalrous." 311 F. 3d 1370 ("[N]owhere in the record did APCo allege that APCo's network of poles is currently crowded. It therefore had no claim."). With this critical fact now known, Gulf Power has a proven claim. ***See id.*** The Presiding Judge should have adopted Gulf Power's Finding of Fact and Conclusions of Law, as well **as** its Reply Findings.

11. The Presiding Judge Erred in Denying Gulf Power's Motion to Strike The Pre-Filed Direct Testimony of Complainant's Economist and Further Erred in Relying on That Testimony.

The Presiding Judge erred in denying Gulf Power's April 21, 2006 Motion to Strike the Pre-Filed Direct Testimony of Patricia D. Kravtin. ***(See*** Complainants' Ex. A). No fewer **than** 50 times over the course of her pre-filed direct testimony, Kravtin offered legal arguments and opinions in the form of testimony, all of which should have been excluded by **the** Presiding Judge. Some examples of Kravtin's impermissible testimony include:

- Discussing her interpretation of *Alabama* ***Power v. FCC: The Court was very specific in identifying*** the economic ***standards that would be required to demonstrate*** a pole was at **'full capacity,'....** ((Kravtin Direct), **at** p. *25,* **lines** 3-6).
- Explaining her interpretation of how to meet **the** legal standard in *Alabama* ***Power v. FCC To satisfy the Eleventh Circuit test, it must be determined... (Id*** at p.

26, lines 6-7).

- Explaining (incorrectly) the basis of the Eleventh Circuit's decision in *Alabama* ***Power v.*** *FCC* The 'economic reality' ***upon which the Eleventh Circuit bases it test relates to....*** (*Id.* at p. 24, line **6).**

- Again (incorrectly) explaining the legal basis of the Eleventh Circuit's decision: ***While the*** **Court** ***recognized the*** 'possibility ***of crowding' on poles ... it was very specific in defining the economic standards that should be used ...*** **to** satisfy **the** 'full capacity' ***criteria articulated*** *by* ***the Court.*** *(Id* at p. 24, lines 22-26).

These instances are only a handful of the legal opinions and arguments Kravtin advanced as to her interpretation of ***Alabama Power*** in her attempt to substitute her legal opinion for that of the Presiding Judge. ***(See id.,*** at pp. 10, 12-13, 21, 23-25, 34, 48-49). When not opining on the meaning and application of *Alabama* ***Power v. FCC,*** Kravtin offered legal arguments and opinions regarding obligations imposed by the federal statutory law as well. ***(See id,*** at p. 11, lines 13-24; p. 15, lines 1-27; p. 29, lines 6-20; p. 31, lines 1-8; p. 33, lines 17-23). Thus, Kravtin stepped well outside the bounds of permissible testimony for an expert witness. She is an economist, not an attorney, and her testimony constituted impermissible advocacy on behalf of the Complainants that should have been excluded. ***See*** *TC Systems, Inc. v.* ***Town of Colonie,*** **213 F.** Supp. 2d 171 **(N.D.N.Y.**2002) (excluding a significant portion of Kravtin's written testimony in that case because it read "more like a legal brief than an expert opinion").

The Presiding Judge compounded **the** error of receiving Kravtin's direct testimony into evidence by relying on her testimony for engineering issues. (*e.g.* Initial Decision ¶ 22, n.11). Kravtin is an economist, not an engineer, not qualified to testify on engineering issues – and she admitted she was not offering engineering testimony. (Kravtin Cross, Tr. p. 1375 ("Q: Ms. Kravtin, you are not offering engineering testimony in this case, are you? ***A*** No, I'm not."). Further, Kravtin was unqualified to testify about the particular poles involved in this dispute, as

she was completely unfamiliar with Gulf Power's pole network. (Kravtin Cross, Tr. pp. 1346-53).

12. The Presiding Judge Erred in Excluding Evidence Relied Upon by Gulf Power's Valuation Expert.

The Presiding Judge erred in excluding from evidence an American Public Power Association Pole Attachment ("APPA") workbook relied upon by Gulf Power's valuation expert. (Spain Direct, Tr. p. 446; GP Ex. 61). That exhibit was shown to be relevant and properly authenticated as a trade industry publication created by a group of municipally owned utilities, the type of document normally relied upon by valuation experts and others in the utility industry in performing their work, and the type of document that the Presiding Judge opined is "admitted pretty readily." (Spain Direct, Tr. pp 436-38; 1127-28; Fed.R.Evid. 402, 703). Despite the relevance and admissibility of Gulf Power Exhibit 61, the Presiding Judge rejected this evidence without delineating specific reasons, though bias was apparently the primary reason. (Document Admission Hearing, Tr. p. 446). Of course, bias is not a valid reason for excluding evidence because it goes to the weight of the evidence, not its admissibility.

Gulf Power was prejudiced by the exclusion of this evidence since, among other reasons; this evidence was relied upon by Mr. Spain in his research related to rates other entities are willing to pay to attach to utilities' poles – *i.e.*, market rates – and could be used to bolster Gulf Power's evidentiary submission on that important issue. (GP Ex. F (Spain Direct), pp. 19-24).

13. The Presiding Judge Erred By Not Allowing Gulf Power the Opportunity to Cross-Examine Complainants' Representatives.

Prior to the hearing, Complainants designated, as part of their case-in-chief, excerpts from the depositions of Bruce Burgess, Mark O'Ceallaigh, Shayne Routh and Jeff Smith, all of whom were designated as Complainants' Rule 30(b)(6) deposition representatives. However,

Complainants would not agree to make these representatives available for cross-examination at the hearing. Consequently, Gulf Power filed notice of its intent to cross-examine the Complainants' representatives with the Presiding Judge. ***(See*** April 17, ***2006,*** "Gulf Power Company's Notice of Cross Examination of Complainants Representative."). Complainants objected to Gulf Power's notice of intent, and the Presiding Judge eventually ordered that Complainants produce only two of these representatives at the hearing. (Document Admission Session, Tr. pp. 607-08,611-12). The Friday before the hearing, the Presiding Judge ***sua sponte*** reversed his prior ruling and stated that Complainants did not have to produce any witness. ***See,*** April 21, 2006 Order, FCC 06M-11; ***see also*** (Harrelson Cross, Tr., pp. 1742). This improperly deprived Gulf Power of its right to cross-examine witnesses whose testimony was accepted into evidence by designation. ***See*** 47 CRC § 1.321(d)(3) (stating that parties may use depositions for any **purpose,** including designation, "*provided the* ***witness is made available for cross-examination")*** (emphasis added)."

IV. CONCLUSION

The totality of the evidence in this proceeding, applied in the context of ***Alabama Power,*** establishes that Gulf Power **is** entitled to compensation above the regulated rate on poles where make-ready would be required to accommodate an additional attachment. The specific amount of compensation due for these poles should be guided by fair market value or a reasonable proxy. Complainants' own agreements with CHELCO, under which they pay $15-20 per attachment, are instructive guideposts, as is the other evidence in this case concerning unregulated transactions.

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11 To be clear, **the representatives' depositions were discovery depositions, not trial depositions.** Thus, **while Gulf Power designated** other **portions of their depositions** for **the** hearing, **doing so did** not **eliminate the unfairness caused by Gulf Power not having the** opportunity **to cross-examine those witnesses** on **the testimony designated as** part **of Complainants'** case-in-chief.

For all **of** the above reasons, the Commission should reject **the** Initial Decision, and issue a Final Order consistent with Gulf Power's Proposed Findings of Fact and Conclusions **of** Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Exceptions have been served upon the following by United States mail and E-mail on this the 2nd day of March, 2007:

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